joined the Bank in requesting the court to declare that Article 5154(c) of *Vernon's Annotated Texas Statutes,* prohibiting strikes by public employees and forbidding, on the part of political subdivisions of the State, collective bargaining with labor organizations reserving the right to strike, rendered unlawful continued employee representation and participation by the Petitioner, Division 1338 of the Amalgamated Transit Union, AFL-CIO (herein called "Union"), in the administration of the Pension Plan and Trust. (App. A, p. 7a; Tr. 33-35).[3]

The trial court rejected the Union's answer and cross action claiming that Article 5154(c) did not apply to the employees as employees of the Dallas Public Transit System and concluded that it was illegal under the State law in question for the Union to participate in the Plan. (App. C, pp. 28-29a). The Court in its judgment instructed the Bank (*ibid*)

> "to disregard any provisions in the Plan and Trust * * * requiring recognition of * * * Union and to deal only with the City * * *, said City being thus entitled to exercise unilaterally all powers formerly exercised by the * * * Company and/or the * * * Union, and the said * * * Union thus being removed as a party to said Plan and Trust."

B. How the Federal Questions Were Raised and Treated.

Petitioners initially raised the constitutional issues here presented upon appeal from the decision of the trial court in Points of Error 9 and 10 to the Texas

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[3] Tr. refers to "Transcript", the compilation of pleadings and orders in the trial court.

Court of Civil Appeals,[4] asserting, *inter alia,* their claims that the trial court's application of Article 5154 (c) denied the employees' rights of freedom of association and due process protected by the First and Fourteenth Amendments to the United States Constitution.

The Texas Court of Civil Appeals treated these issues on their merits, ruling that its revision of the trial court's interpretation and application of Article 5154(c), discussed *infra* at pp. 8-9, had cured any denial of the "employees' rights of association specifically protected by the First Amendment to the Constitution of the United States and * * * the due process protections of the Fourteenth Amendment * * *." (App. A, p. 21a).

Petitioners' motion for rehearing, denied without opinion in the Texas Court of Civil Appeals, reiterated the claim that the decree, as modified, abridged constitutional rights of association and added that the court's revision of the decree discriminatorily excluded the Union as employee-representative in violation of

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[4] These points are set forth in Petitioners' Brief in accordance with Texas practice at pp. 7, 39-42, as follows:

> "*Point 9:* Article 5154(c), as applied here, is repugnant to the following provisions of the Constitution of the United States:
>
> (a) The Fourteenth Amendment to the Constitution . . .
>
> "*Point 10:* The trial court's application of Article 5154(c) to employees of the Dallas Transit System denies employees' rights of association specifically protected by the First Amendment to the Constitution of the United States, contrary to the due process protections of the Fourteenth Amendment to the Constitution of the United States."

the equal protection clause of the Fourteenth Amendment.[5]

The foregoing federal questions were re-urged in the Union's application for writ of error, denied, no reversible error, without opinion, by the Supreme Court of Texas.[6]

The same constitutional points were again presented on motion for re-hearing to the Supreme Court of Texas[7] but were overruled, again without opinion.

C. The Facts.

The Pension Plan and Trust here involved (App. D, pp. 31a-60a; S. F. 348-A and App. E, pp. 61a-78a; S.

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[5] Page 22 of the Motion for Rehearing, reiterates, *in haec verba* the "Point 10" set out in footnote 4, *supra*, and set forth at page 2 is the specific complaint of "the denial of constitutionally required due process and equal protection . . ."

[6] As set forth at pp. 3-4, 27-30, these points included:

> "3. The Court of Civil Appeals erred in failing to hold that application of Article 5154(c) to Union employees of the Dallas Transit System denies rights of association guaranteed by the First Amendment to the Constitution of the United States, contrary to the due process protections of the Fourteenth Amendment.
>
> "4. The Court of Civil Appeals erred in failing to hold that the reformation of the Pension Trust and the removal of the Union as a party thereto constituted denial of substantive due process of law, contrary to the Fourteenth Amendment."

It was also asserted therein that "the outlawry of the Union, as such, constitutes insidious discrimination without reasonable basis" in violation of the Fourteenth Amendment. (p. 30).

[7] It was there asserted:

> "The judgment which this Court has refused to review denied petitioners' rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States" (Motion For Rehearing, p. 2, par. 1).

F. 349) were executed by the Dallas Transit Company (herein called "Company") and the Union, as the collective bargaining representative of the Company's bus operators and mechanics, on April 6, 1960, while the transit system serving the City and adjoining areas was still privately owned and operated (App. A, pp. 1a-2a; S. F. 219-221).

The Plan and Trust provided for retirement benefits based on contributions by both the Company and employees, and designated the Bank as trustee (App. A, pp. 1a-2a; App. E, p. 61a). Principal administrative duties were concentrated in a retirement committee consisting of two Company and two Union designees. (App. A, pp. 2a, 13a; App. D, pp. 47a-48a). All acts and decisions were to be made by a majority of the committee, and any dispute resulting from the failure of a majority to agree was to be referred to the Plan actuary for binding arbitration (*ibid*). Alteration of the Plan was to be accomplished only upon mutual consent of the Company and Union. (App. A, pp. 2a, 13a; App. D, pp. 53a-54a; App. E., p. 74a.).

In December of 1963 the City purchased the physical assets of the Company and assumed its rights under the pension plan, although the same sales contract further provided that the City was "not assuming or recognizing any union contracts" (App. A, pp. 3a-4a; Tr. 47, 49-50, 52).

In January of 1964 the City vested a board of independent trustees, designated the Dallas Public Transit Board (herein called "Transit Board"), with complete authority over the control, management and operation of the Transit System. (App. A, pp. 5a-6a; S. F. 377, 406).

Thereafter, for a period of more than three years, the City continued to make payments according to the terms of the Plan while refusing to recognize the right of the Union to represent the employee beneficiaries thereunder or otherwise to participate in the administration of the Plan and Trust (App. A, p. 4a; S. F. 231, 274).

In the summer of 1966, however, the Transit Board initiated steps unilaterally to combine the Trust's 2.7 million dollar pension fund with another plan covering supervisory and non-union employees and having a fund of less than $800,000.00. (S. F. 150-152, 387). The instant action was filed shortly thereafter.

D. The Decision of the Texas Court of Civil Appeals.

The Texas Court of Civil Appeals upheld the trial court's rulings that the Transit Board was an agency of the City and the employees of the Transit Board, public employees (App. A, p. 11a). That court also sustained the trial court's conclusion that application of Art. 5154(c) to the Transit Board and the employees of the transit system rendered it unlawful for the City to recognize the Union. The court reasoned that

> "* * * the Plan and the Trust, while not collective bargaining agreements, as such, do result from collective bargaining agreements and necessarily provide, by their very terms, the continuation of collective bargaining agreements between the Union and the Company. We think * * * it would have been illegal for the City of Dallas to have entered into the Plan and Trust agreement in their inception. Being illegal as against the public policy to enter into a collective bargaining agreement with the Union, a fortiori, it is against the

> public policy of Texas for the City to administer the collective bargaining contract once it has been entered into." (App. A, p. 15a).
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> * * * * * * * * *
>
> "Accordingly, it is our opinion and we hold that it is illegal for the City of Dallas to be a party to the Plan and Trust with the other party thereto being the Union which claims to be the collective bargaining representative of the Union employees." (App. A, p. 16a).

The Texas Court of Civil Appeals noted, however, that Sec. 6 of Art. 5154(c), specifically preserves "the existing right of public employees to present grievances concerning their wages, hours of work, or conditions of work individually or through a *representative that does not claim the right to strike.*" (Emphasis in the original). (App. A, p. 14a). The court held, therefore, that the trial court erred in according the City the right to unilateral control and administration, "thereby depriving the employees and beneficiaries of the Plan and Trust from any representation whatsoever." (App. A, p. 16a).

The Texas Court of Civil Appeals accordingly, while affirming the trial court's removal of the Union from the Plan, reformed the decree to grant to

> "the employees who are beneficiaries under such Plan and Trust * * * the right and privilege of selecting or electing their own representative or representatives, provided such representative or representatives do not reserve the right to strike, to be substituted for and in lieu of the Union in the administration and other provisions of the Plan and Trust." (App. A, p. 19a).

The court expressly held that Article 5154(c) as so interpreted and applied to restore the bilateral admin-

istration of the pension fund, did not deny the employees' rights of association protected by the First and Fourteenth Amendments to the Constitution. It stated that (App. A, p. 21a)

> "[t]he complete answer to this contention lies in the fact that the employees of the City of Dallas have a right to associate together as a union. This right is not denied. The thing that is denied is that, if they do so associate, they do not have the right to collectively bargain with the City, provided that the Union reserves the right to strike."

The court thus excluded the Union as the employees' representative under the Plan and Trust while permitting the employees acting by and through any other duly selected or elected representative, disclaiming the strike prerogative, to retain the rights to designate committeemen and to participate in lieu of the Union on a consensual basis in the administration and amendment of the Plan and Trust (App. A, pp. 18a-19a). The only warrant found by the court for its conclusion that the Union asserted the right to strike lay in certain constitutional provisions of the Amalgamated Transit Union regulating the conduct of its Local Divisions in strike situations (App. A, p. 6a; S. F. 17-18). The court disregarded countervailing considerations that these constitutional provisions grant strike permission only after the Local Division has offered to arbitrate the dispute, and that the instant Pension Plan provides for binding arbitration in the event of a failure of the Retirement Committee to agree (App. A, p. 2a). The court asserted that the rights granted the Union to participate in the amendment and enforcement of the Plan would entail "a possibility of disagreement between the Union and the Company

(now the City) in which event collective bargaining would be inevitable" (App. A, p. 14a).

REASONS FOR GRANTING THE WRIT

Questions as to the extent to which employees transferred to public status may be deprived of their rights of association in a pension plan, or may be required to forego the protection of pension rights in such plan through the union of their choice are important issues of federal law. This Court should deal with these unsettled issues by applying the constitutional principles enunciated in *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217 and *Railroad Trainmen* v. *Virginia Bar* 377 U.S. 1.

The nation is in an era of public acquisition of transportation facilities, involving not only the change from private to public in the ownership of the facilities, but the shift from private to public employment of those who operate them.[8]

The Texas courts below have held that public acquisition and assumption of a private pension plan and trust justifies obliteration by state court decree of employee representational rights and protections valid when obtained through collective bargaining prescribed by federal law. See, *Lewis* v. *Benedict Coal Corp.,* 361 U.S. 459, 468. The decree here sought to be reviewed

[8] "Of the more than 100 transit systems owned by governmental bodies in the United States at the beginning of 1967, half ha[d] been established or taken over from private control since the beginning of 1960, and one out of four since January 1965 * * *." *The American City 1967 Nationwide Inventory of Governmental Mass Transit Facilities,* Market Report #SP-1084, American City Magazine, Buttenheim Publishing Corp., New York, N. Y., April 1967.

denies public employees the right to continued association through the labor organization they chose to maintain joint control of pension funds to secure their old age.

The instant case thus raises serious and oft-recurring questions as to the extent to which public acquisition of private enterprises may constitutionally permit destruction of valuable private pension rights and interests and restriction of the instrumentalities and organizations through which public employees may associate to protect those hitherto private rights and interests.[9]

1. The effect of the Texas statute, as applied by Texas courts to remove as a party to a pension trust the representative selected by the employee beneficiaries to police their interests therein, is to deny public employees constitutionally protected freedoms of association, assembly and petition. Under well established constitutional principles, the transfer from private to public ownership does not justify denial of employees' representation through their union to protect their pension rights.

The First Amendment freedoms of association, assembly and petition against government interference are made applicable to state intrusion by the Four-

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[9] Cf. *Dade County* v. *Amalgamated Association,* 157 So. 2d 176 (Fla. App.), appeal dismissed, 166 So. 2d 149 (Fla. S. Ct.), cert. den., 377 U.S. 971; *Ohnstad* v. *Tacoma,* 64 Wash. 2d 904, 395 P. 2d 97; *Martin* v. *Los Angeles Metropolitan Transit Authority,* 238 C.A. 2d 183, 47 Cal. Rptr. 653; *City of Cleveland* v. *Division 268, Amalgamated Association,* 90 N.E. 2d 711 (Ohio Ct. Com. Pls.); *Glidwell* v. *Hughey,* 314 S.W. 2d 749 (Mo. S. Ct.); *City of Detroit* v. *Division 26 of Amalgamated Association,* 332 Mich. 237, 51 N.W. 2d 228.

teenth Amendment.[10] These First Amendment freedoms have been held to safeguard the right to union membership in both private and public employment.[11] Thus, a state may not prohibit public employees from joining a union.

The proposition that public employees have the right to associate together in a union is not, however, limited to that naked right. *State ex rel Missey* v. *City of Cabool, supra; Indianapolis Education Ass'n* v. *Lewallen,* D.C.S.D. Ind. Civil Action No. 1P 69-c-252, prelim. inj. issued, June 19, 1969, W. E. Steckler, J. This Court has held that when a union provides a legal services plan to improve its members' representation in regard to personal injury claims arising under federal statutes, such plan is protected by the First Amendment. *Railroad Trainmen* v. *Virginia Bar, supra.* This Court in *Railroad Trainmen,* stated (377 U.S. at pp. 5-6):

> "It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the[ir] rights . . . The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel."

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[10] E.g., *U. S.* v. *Robel,* 389 U.S. 258, 263; *United Mine Workers* v. *Illinois Bar Association,* 389 U.S. 217; *NAACP* v. *Button,* 371 U.S. 415; *Railroad Trainmen* v. *Virginia Bar,* 377 U.S. 1.

[11] *Thomas* v. *Collins,* 323 U.S. 516; *McLaughlin* v. *Tilendis,* 398 F. 2d 287 (C.A. 7); *American Federation, etc.* v. *Woodward,* 406 F. 2d 137 (C.A. 8); *Atkins* v. *City of Charlotte,* 296 Supp. 1068 (W.D.N.C.); *State ex rel. Missey* v. *City of Cabool,* (W.D.N.C.), 70 LRRM 3394, (Mo. S. Ct., decided April 14, 1969).

Similarly, this Court has held that union members have a First Amendment right to employ salaried counsel to aid them in asserting rights under a state workmen's compensation statute. *United Mine Workers* v. *Illinois Bar Association, supra.*

The right of public employees to join a labor union, given mere lip service by the Texas Court of Civil Appeals in the instant case (App. A, p. 21a), must therefore include the rights of such employees to use their union for the purpose of effectively enforcing and protecting their rights in a private pension plan voluntarily assumed by a municipality. This latter right would clearly encompass the right of Dallas Transit System employees to designate the Union as protector of their rights under the instant Pension Plan and Trust.[12]

The First Amendment right of public employees to use their union as a means of effectively protecting their interests in a publicly assumed pension plan would indeed be a "hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *United Mine Workers* v. *Illinois Bar Ass'n, supra,* 389 U.S. at 222. A constitutional right of such dimensions may only be abridged or limited upon a

[12] It is no sufficient answer to suggest to the employees, as has the Court of Civil Appeals, that there are other means by which bilateral control of the Fund may be exercised. The privilege of selecting a representative which has neither the personnel nor the means effectively to protect the employees' interest is an empty one. The right to associate includes the right of effective association into a body which has the means effectively to perform the function for which individuals associate in it.

showing of valid, compelling and paramount public interest on the part of the State of Texas. There is no showing of such paramount public interest on the part of Texas here.

Assuming, *arguendo,* that a State has a valid interest in protecting the functioning of government against strikes,[13] that State interest viewed in the context of the representation of employees by their union in protecting their rights and interests in an existing pension plan is not sufficiently strong to justify the intrusion made upon the employees' rights to freedom of association, expression and petition in the circumstances of this case. There simply is no assertion by the Union of the right to strike to justify removal of the Union from the instant Pension Plan and Trust. Since under the Plan a deadlock among the retirement committee is to be referred to a binding arbitration,[14] and the Union constitution and by-laws require submission of any dispute to arbitration before strike permission is granted, the Union in fact does not reserve the right to strike in regard to the Pension Plan and Trust. Hence Art. 5154(c), as applied by the Texas Courts, has the broad effect of prohibiting union activity by public employees in an area where there is no clear and present danger of a strike and is thus unsupported by any compelling State interest.

In any event, assuming, *arguendo,* the existence of conflicting interests, the Court's application of Article 5154(c) to the Pension Plan and Trust Agreement

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[13] Petitioners do not concede that a State has a valid interest in a blanket prohibition of all strikes by any public employees, but we do not argue that point here.

[14] Final, binding and peaceful arbitration insures that there will be no strike. *Teamsters v. Lucas Flour Co.,* 369 U.S. 95.

runs afoul of the constitutional protection of freedom of association through overbreadth. Controlling Supreme Court cases command the resolution of conflicting interests in the light of an inquiry into the existence of less restrictive alternatives by which the state or city or transit board could achieve the same end. Section 3 of Article 5154(c) explicitly prohibits strikes by public employees. That section in itself abundantly protects any interests the state may have in preventing strikes against the city or against the transit board. The flaw here in the state law is an intolerable overbreadth unnecessary to the protection of any valid state interest. *Shelton* v. *Tucker*, 364 U.S. 479; *NAACP* v. *Button*, 371 U.S. 415; *U. S.* v. *Robel*, 389 U.S. 258.[15]

2. A corollary result of Article 5154(c)'s interference with the union activities of public employees is its unreasonable discrimination against the Union itself, constituting state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

Under the Texas courts' application of Article 5154 (c) in the instant case, Dallas Transit System employees are told in effect: "You may associate to protect your old age *but may not do so in the petitioner Union.*" The statute, as applied, discriminatorily censors the type of association in which public employees may associate to protect their legitimate vested pension interests.

The Equal Protection Clause commands, "... (c)lassifications cannot be made arbitrarily ... (but) must

[15] In *Shelton* v. *Tucker, supra*, this Court remarked "... Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle personal liberties when the end can be more narrowly achieved." 364 U.S., at 488.

always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . . ." [16] As previously noted, Article 5154(c) has as its object the protection of government functioning against strikes by public employees. But in regard to the Pension Plan and Trust, the Union here has not reserved the right to strike. Accordingly, the application of Article 5154(c) to require the removal of the Union as a party to the Pension Plan and Trust constitutes a discrimination against the Union not reasonably related to the purpose of the Act pursuant to which the classification is proposed, and denies the Union and its members equal protection of the laws under the landmark test set out in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis, supra.*

CONCLUSION

The Texas courts have interpreted a Texas statute so broadly as effectively to restrict virtually all ordinary union activity on the part of public employees, leaving them with no more than the mere right to maintain membership in an ineffective and useless labor organization. This interpretation runs afoul the rights of the public employees effectively to associate. Moreover, the classification of labor unions of public employees as outlawed organizations—barred from performing any function in the administration of a trust agreement is so wholly without rational basis as to violate the Fourteenth Amendment.

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[16] *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150, 155.

WHEREFORE, petitioners pray that certiorari be granted, and that upon final hearing the decision below be reversed.

Respectfully submitted,

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